No. 16117

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEBASTOPOL APPLE GROWERS UNION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JEROME D. FENTON,
General Counsel,
THOMAS J. McDERMOTT,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
MELVIN J. WELLS,
Attorney,
National Labor Relations Board.

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In this reply brief, we shall address ourselves to certain of respondent's arguments in connection with that phase of the case involving the mass layoff, which were not fully anticipated in our opening brief, and to respondent's contention that its agreement with the Union required the Board to dismiss the complaint.[1]

[1] In connection with the discharge of Elsie Dickerson, respondent complains that the Board cited "only the Trial Examiner's report, rather than evidence," to show that respondent knew Dickerson served as a union observer at the election (Res. Br., p. 61, fn. 45). The evidence supporting this finding does not appear in the printed record, but is on pages 1096 and 1097 of the typed transcript on file with the Court, as follows:

Q. (By Mr. Magor) Do you recall the election?

A. (By witness Elsie Dickerson) Yes.

Q. Can you tell us what occurred on that date, if anything?

A. Well, about—oh, five minutes before quitting time, one

I. The Board properly rejected respondent's contention that its agreement with the union required dismissal of the complaint

As shown in our main brief (p. 41, fn. 17), it is well settled that private agreements or settlements do not affect the Board's power to issue appropriate remedial orders, and that the Board's refusal to dismiss the complaint herein was within its discretion. See, in addition to decisions cited in our main brief at p. 41, *N.L.R.B.* v. *Walt Disney Products,* 146 F. 2d 44, 48 (C.A. 9), certiorari denied, 324 U.S. 877.

Respondent attacks the Board's refusal to consider its private settlement agreement an ample basis for dismissing the complaint principally on the grounds that: (1) "The Board did not find anything wrong with the agreement and there is not the slightest criticism of it in the Board's brief. The elements giving

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of the girls standing by told me that Ella was calling my name, so I turned around to see, and she was calling my name, so I stopped over to see what she wanted, and she told me that Mr. Martini wanted to see me in the office.

Q. And, you refer to Ella, is that Ella Herrerias?

A. That is Ella Herrerias. So I went down, went outside, I was going to the office, and I saw Mr. Martini standing out there, and I asked him if he wanted to see me, and he said, "They want you over there," and he motioned toward the packing house.

Q. And what was taking place in the packing house?

A. The election.

Q. That is, the National Labor Relations Board election?

A. Yes.

Q. And did you—Strike that. Did you participate in that election?

A. Yes.

Q. And what did you do?

A. I was observer for the Teamsters.

rise to the dispute—the non-recognition of the union and the alleged discriminatory discharges—have long ago been extinguished." (Res. Br. p. 8); and (2) "Here the remedial purposes of the Act have been concededly accomplished; the Board now seeks to punish respondent by exacting retribution (Res. Br. p. 10)." Respondent also declares that it is "undisputed that back pay was not the main interest of the employees * * * (Res. Br. p. 9, fn. 9)."

All these supporting arguments misconceive the Board's position. To begin with, this proceeding does not involve a refusal to bargain, the unfair labor practices consisting of numerous instances of interference, restraint, and coercion in violation of Section 8(a)(1) (Bd. Br. pp. 4–9), discriminatory acceleration of the normal seasonal reduction in force and discriminatory selection of employees laid off in violation of Section 8(a) (3) and (1) (Bd. Br. pp. 9–19), and the discriminatory discharge of three Union adherents in violation of Section 8(a) (3) and (1) (Bd. Br. pp. 19–24). Recognition of the Union as bargaining representative of respondent's employees is therefore not pertinent to remedying the unfair labor practices here committed. The Board's order which we are seeking to enforce here provides that respondent cease and desist from the unfair labor practices found, and, affirmatively, that respondent post notices and make whole the employees for losses suffered as a result of respondent's discrimination. Respondent, by its own admission, has failed to comply fully with either of these affirmative provisions of the Board's order. It has not posted notices, as required, nor has it com-

plied with the back-pay provision. Although respondent asserts (Res. Br. p. 8, fn. 8) that the employees involved "have been notified," its sole support for this assertion is in the charging Union's statement to that effect in its answer to the General Counsel's opposition to respondent's motion to dismiss the complaint (R. 190–195). Respondent's further assertion to the effect that back pay "was not the main interest of the employees" is also based solely on the charging Union's opposition referred to above. Far from being "punitive," as respondent suggests, the normal back-pay remedy here is the only affirmative action required as a remedy for the widespread and flagrant discriminatory acts. That the remedy of back pay is in the public interest, rather than punitive in nature, is too well settled to require discussion. See, for example, *Phelps Dodge Corporation* v. *N.L.R.B.,* 313 U.S. 177, 197; *N.L.R.B.* v. *Talladega Cotton Factory, Inc.,* 213 F. 2d 208, 216–217 (C.A. 5). For these reasons we submit that the Board acted reasonably, and well within the scope of its discretion, in denying respondent's motion to dismiss the complaint on the basis of its private settlement with the charging party.

II. Substantial evidence on the record considered as a whole supports the Board's conclusion that respondent accelerated its seasonal layoff and selected employees for inclusion therein for anti-union reasons, thereby violating section 8(a) (3) and (1) of the act

Respondent attempts, as it did before the Board, to ascribe business reasons as motivating the October 15 layoff. As shown in our main brief, the affirmative evidence convincingly establishes that respondent de-

liberately brought about the conditions that impelled the layoff for the purpose of defeating the Union (Bd. Br. pp. 27–34). Superintendent Duckworth's admission to Unciano that apples were being shipped to Co-op for this reason is not an isolated statement, nor, as respondent suggests (Res. Br. pp. 18–19), is it the sole evidentiary support for the Board's conclusion. Forming a prelude to this admission are respondent's numerous acts of interference, restraint, and coercion. And Plant Manager Martini's warning to employees Pate and Lindsay that "if the plant would go Union * * * he'd close it down" (Bd. Br. p. 5), and his subsequent statement to a group of employees that "he would close the plant down rather than see it go union * * *" (Bd. Br. pp. 5–6) point up the correctness of Duckworth's statement. The disproportion of Union adherents laid off is additional support, borne out by the record, for the Board's conclusion that respondent was not motivated by business considerations, but by hostility toward and a desire to defeat the Union, in bringing about the layoff. It is only when balanced against all these factors that the Board, in assaying respondent's asserted reason, found that the shipments of apples to the Co-op were not justified.

The Board's conclusion that respondent's defense does not stand up under scrutiny is amply demonstrated by the facts of this case. Respondent does not dispute, for example, that it had enough storage space for cans in 1954; it claims rather that some of this space was not usable because of possible rusting. Yet it used this identical space in other years despite the

danger of rusting. The only change of circumstances was the advent of the Union. True, respondent could have decided that it had followed an unwise practice in this respect in other years. But the coincidence of changing its methods when it did, in the light of all the other evidence of its unlawful motivation, warranted the Board's rejection of this aspect of respondent's defense. Respondent argues that it sent some apples to Co-op in 1953, and that the proportionate increase in the amount of apples going to Co-op in 1954 was not large relative to the increased size of the apple crop in 1954. Even based on respondent's figures, the amount sent in 1954 was more than 800 percent larger than that sent in 1953. Furthermore, respondent does not take into account that all apples (155 tons) sent to Co-op in 1953 were for processing in 8-ounce cans that respondent was not equipped to handle, although conveniently ignoring that respodent also shipped apples to Co-op in July 1954 for this purpose—a shipment that the Board did not conclude was for any unlawful purpose (Bd. Br. p. 14, R. 78; 1264). Thus, insofar as shipments to Co-op were made that respondent was equipped to handle, the true proportion is none in 1953 as against 1358 tons in 1954. And, as the record shows, no apples were processed for respondent by Co-op in either of the two previous years, 1951 and 1952. Emphasizing respondent's unlawful purpose in shipping apples to Co-op are the facts that all 1358 tons were sent in the one month period from September 13 to October 15, and that respondent continued to ship apples to Co-op even after it decided that the shortage of ap-

ples required it to lay off about half its employees. Respondent's shipments to Co-op during the three days before the layoff, even though processing apples by Co-op cost more than canning them itself,[2] manifest respondent's determination to rid itself of a substantial number of Union members before the election. At least by October 12, respondent must have known that each ton of apples sent to Co-op meant less work for its own employes, and hence an earlier layoff, as respondent's decision on October 12 to curtail its operations was based on the fact that there were not going to be enough apples to keep two shifts active.

III. The Board properly included all employees not on respondent's retention list in its order requiring respondent to make whole discriminatorily laid off employees

Respondent contends that the Board mistakenly includes a large number of employees as discriminatorily laid off (Res. Br. pp. 39–48).[3] This contention is grounded on a misconception of the Board's theory on this aspect of the case. Thus, respondent asserts that employees who were hired after October 2, the

[2] Respondent suggests that the Board's finding to this effect is not supported by the evidence, although, significantly it does not assert that the Board's finding is untrue (Res. Br. pp. 19–20). The record reference in our main brief (p. 15) refers to an exhibit furnished by respondent, which contains both transportation costs *and* production costs of apples processed for respondent by Co-op. Our main brief erroneously uses the figure $1.58 as the per case cost of production at Co-op; the correct figure, as shown by the record, is $1.50.

[3] As the Board did not order reinstatement (R. 160–170, 200), respondent's statement that ". . . inclusion of these employees among those who are ordered reinstated with back pay . . ." (Res. Br. p. 39) is apparently an inadvertency.

eligibility date for the election, and employees who were not union sympathizers, were improperly included as discriminatees; the former because their layoff could not have been to affect the results of the election, the latter for the same reason and because "they obviously were not laid off because of their union activities or sympathies since concededly they had none" (Res. Br. p. 44). However, as our main brief demonstrates and the Board's decision makes clear, but for the unlawful layoff all these employees, as well as others respondent categorizes as improperly included,[4] would have continued to work. Granting the Board's position that the layoff itself was discriminatorily motivated, it is immaterial, therefore, that the effectuation of respondent's unlawful purpose included employees who were not eligible to vote in the impending election or who were not shown to be Union sympathizers.

The other groups that respondent asserts were mistakenly included are all employees whose names were not on the retention list. As to those subsequently rehired, who may have lost little or no pay, the Board will, of course, at the compliance stage of this proceeding, determine the amount of back pay, if any, accruing. *N.L.R.B.* v. *Waterfront Employees of Washington,* 211 F. 2d 946, 953 (C.A. 9); *N.L.R.B.* v. *Venetian*

[4] For example, some employees were on respondent's retention list but did not continue to work because they were unable to work on the day shift. Although not technically laid off, this group of employees, like the ineligibles and those who were not Union sympathizers, would have been employed for some time after October 15 had respondent not accelerated its production by use of the Co-op and prematurely shut down one shift.

Blind Workers' Local 2565, 207 F. 2d 124, 126 (C.A. 9); *N.L.R.B.* v. *Stilley Plywood Company, Inc.,* 199 F. 2d 319 (C.A. 4). Similarly, should the facts show that any employee was not available for employment by reason of illness or for any other reason, such employee would receive no back pay. In short, the Board has made no determination as to which employees shall receive back pay, or in what amounts they shall receive it. The Board's order requires that the employees not on the retention list, as well as the three employees whose discriminatory discharges were not related to the mass layoff, be "made whole."

One final category of employees, as to whom the reasons advanced herein are generally applicable, requires additional comment. These are the approximately eight employees who, after the meeting at which the layoff was announced, failed to continue working. Respondent contends that they quit and therefore were not "laid off" (Res. Br. p. 43). As the so-called "quitting" was itself a direct consequence of the discriminatory layoff, it is clear that these employees would have continued to work but for respondent's unlawful actions. The record suggests that there was some confusion at the meeting announcing the layoff as to whether or not employees should continue to work that evening's shift (R. 161–167). Even if there had been no confusion,[5] these employees had

[5] Superintendent Duckworth testified, for example, that one employee, Breuer, left immediately after the meeting, saying "If I'm not going to work any more this year I may as well just quit right now" (R. 166). The Trial Examiner did not base any finding on this testimony.

been told that they were not to report for work the next work day, October 18, and were clearly laid off.

CONCLUSION

For the foregoing reasons and those stated in the Board's opening brief, it is respectfully submitted that a decree should be entered enforcing the Board's order in full.

JEROME D. FENTON,
General Counsel,
THOMAS J. MCDERMOTT,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
MELVIN J. WELLES,
Attorney,
National Labor Relations Board.

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